A SUMMARY OF EXECUTORSHIP LAW

By

A. J. BELSHAM, LL.B.

Barrister-at-Law

and

J. ALISTAIR DYSON, A.C.A.

FIRST EDITION

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PREFACE

THIS book has been written to meet a persistent demand from Students for a concise summary of a very intricate subject. This demand has been intensified by the coming into force of the Law of Property Act, and other legislation of 1925, and we feel that at no time would Examination Candidates welcome such a work more than at the present, when all the Examining Bodies have signified their intention to set questions which require a knowledge of the present (new) law.

Since many estates must still be administered according to the law, which up to the 31st December, 1925, was generally applicable, we have summarised fully both the old and the new, setting out clearly the differences and the changes brought about by recent legislation.

Estate Duty, Apportionment, etc., and the relative accounting, are dealt with in the companion volume to this work—"An Executor's Accounts," by E. Miles Taylor, F.C.A., and H. A. R. J. Wilson, A.C.A., from the same publishers.

A. J. B.
J. A. D.

July, 1926.

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ABBREVIATIONS

For the sake of compactness the following abbreviations are employed throughout the text :—

A.E.A. . . .	Administration of Estates Act, 1925
J.(C.)A. . . .	Judicature (Consolidation) Act, 1925
L.P.A. . . .	Law of Property Act, 1925
P.R.(N.C.) . .	Probate Rules (Non-Contentious)
R., or r. . . .	Rule
R.S.C. . . .	Rules of the Supreme Court
S., or s. . . .	Section
T.A. . . .	Trustee Act, 1925
W.A.	Wills Act, 1837

The term "personal representative" includes both an executor and an administrator.

A SUMMARY OF EXECUTORSHIP LAW

CHAPTER I

WILLS

INTRODUCTORY.

When a man dies one of the first things to ascertain is whether he has left a will. If he has, and has by his will appointed executors, those executors, provided they have legal capacity, are the proper persons to administer his (the testator's) estate, and they are entitled to obtain from the Court a grant of probate. If the testator has not appointed executors of his will, or his appointment fails, then certain persons will be appointed by the Court to be administrators of his estate, and they will obtain a " grant of administration with the will annexed," that is to say, they will be bound by the directions of the will in administering the estate.

If the deceased person has died without making a will, then again a grant of administration must be obtained from the Court by certain persons who will be entrusted with the administration of the deceased's (intestate's) estate according to prescribed rules of law.

An intestacy may be either in deed or in law. There is an intestacy in deed—

(*a*) if the deceased has made no will, or
(*b*) if his will is entirely inoperative.

There is an intestacy in law—

(*a*) if the deceased has made a will without appointing executors, or
(*b*) if he has appointed executors but the appointment fails because they
  (i) predecease him, or
  (ii) refuse to act, or
  (iii) are incapable of acting, or
  (iv) die without having obtained probate.

A WILL is a mode of disposing of property intended to come into operation only on the death of the person making it (called the " testator ").

A CODICIL is an instrument (" a little will ") made subsequent to the will and with the same formalities, which is used to explain, add to, or vary the will, and when made it becomes part of the will. The number of codicils must be stated in the executor's oath for obtaining probate.

THE ESSENTIALS OF A VALID WILL AND CODICIL.

By S. 9, W.A., no will shall be valid unless—

(i) it is in writing (but see " Soldiers' and Sailors' Wills," *infra*) ;

(ii) it is signed by the testator or by some other person in his presence and by his direction ;

(iii) the signature is at the foot or end of the will or so placed that it is apparent on the face of the will that the testator intended to give effect by his signature to the writing signed as his will ; (Nothing which follows the signature will be operative (Wills Act Amendment Act, 1852).)

(iv) such signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time ; and

(v) such witnesses attest and subscribe the will in the presence of the testator.

No form of attestation is necessary, but an attestation clause is usually added. This is desirable as it simplifies probate.

The forms and solemnities of a will are governed by the law of the testator's domicile.

WILLS OF BRITISH SUBJECTS MADE OUT OF THE UNITED KINGDOM.

These, so far as they concern personal estate, are valid and will be admitted to probate if made according to the forms required by the law (i) of the place where the will is made, or (ii) of the place where the testator was domiciled when it was made, or (iii) of that part of His Majesty's Dominions where the testator had his domicile of origin (Wills Act, 1861, S. 1).

A will made within the United Kingdom by a British subject, whatever his domicile, is, as regards personal estate, well executed if executed according to the laws for the time being in force in that part of the United Kingdom where the will was made.

A will of a British subject is not revoked or invalidated by a subsequent change of domicile.

PROPERTY ABROAD.

A will which disposes only of property in a foreign country is not entitled to probate in England, nor will letters of administration be granted where the deceased left no property in England.

FORM OF WILL.

Any instrument may be admitted to probate if it was intended to operate after the testator's death, is executed in accordance with the above-mentioned statutory requirements, and disposes of property in England. No special form is required if these conditions are complied with, and deeds, documents in the form of letters, orders on a banker, and memoranda have been admitted to probate.

Documents referred to in the will may be included when strictly identified.

Probate may be granted of part of an instrument and refused as to the rest.

LOST OR DESTROYED WILL.

Probate of the contents of a lost or destroyed will may be granted provided that the loss or destruction was not such as to effect a revocation. Clear proof of its contents and of its due execution and attestation is necessary. The evidence of a single witness, though interested in the deceased's estate, has been accepted (Sugden *v.* Lord St. Leonards, 1 P.D. 154).

A true copy or draft of the will may be admitted to probate in the absence of the original.

HOLOGRAPH WILL—is one wholly in the testator's own handwriting. It now possesses no special advantages, but, at one time, it might be proved though unsigned.

PRIVILEGED AND NUNCUPATIVE WILLS.

A nuncupative will is one made orally.

A soldier on actual military service, or a mariner or seaman being at sea, may make a nuncupative will affecting personalty, and, since the Wills (Soldiers and Sailors) Act, 1918, realty also. He may make a will at and after the age of fourteen. Witnesses are not essential.

The term soldier includes officers. The term seamen includes both the Royal Navy and the Merchant Service, but there are certain exceptions to the property capable of being disposed of by their nuncupative wills.

TESTAMENTARY CAPACITY.

Infants cannot make a will, except as above. Lunatics can, during a lucid interval. Idiots cannot. A married woman can in respect of her separate estate.

REVOCATION.

A will speaks from the death, and until death it is capable of revocation. It is said to be ambulatory until death.

A will or codicil may be revoked by :—

(i) Subsequent marriage (but, after 1925, marriage will not revoke a will expressed to be made in contemplation of the marriage (L.P.A., S. 177)).

(ii) Another will or codicil, but unless the earlier will is expressly declared to be revoked, it will only be revoked in so far as the later will or codicil is inconsistent with its provisions.

(iii) A writing executed as a will and declaring an intention to revoke.

(iv) Burning, tearing or otherwise destroying the will, by the testator or by some other person by his direction and in his presence, with the intention of revoking it. This intention to revoke (*animus revocandi*) is essential.

If a will is destroyed without the testator's authority, he cannot by ratification render the destruction a valid revocation.

So where a subsequent will is made and the earlier will is then destroyed in the belief that the later will is a good and valid will, and such later will proves to be invalid or ineffectual, the earlier will will not be revoked, but may be admitted to probate. Its revocation was dependent on the validity of the second will, and, as this proves invalid, the necessary absolute intention to revoke is wanting. There is merely what is called a " dependent relative revocation."

A revoked will or codicil may be revived by re-execution, or by a properly executed codicil showing an intention to revive it.

ALTERATIONS.

Any alteration, interlineation or erasure should be signed or initialled by the testator and the witnesses, and should be referred to in the attestation clause.

By S. 21, W.A., it is provided that no obliteration, interlineation or other alteration made after execution shall be valid unless executed as the will is required to be executed.

REAL ESTATE.

Formerly, a will dealing with land only and not appointing executors could not be proved, but, since 1897, probate or letters of administration may be granted in respect of real estate though there is no personal estate (Land Transfer Act, 1897, S. 1; A.E.A., S. 2; J.(C.)A., S. 155).

MUTUAL WILLS.

Two persons may agree each to make a will in favour of the other. Such wills are still capable of revocation, although the revocation by one may result in a breach of contract. Where one dies and the other takes a benefit under the former's will and subsequently alters his own will, the altered will is valid, but a trust to perform the agreement may be imposed on the personal representative (Stone *v.* Hoskins, 1905, P. 194).

CONTINGENT WILLS.

These are wills made in contemplation of the happening of a certain event, to come into operation only if that event happens. They are often made where a person is going abroad for a spell and desires to provide for the contingency of his death while abroad. There must be a clear indication that the will is only to operate in the event of the contemplated contingency occurring. Then if it does not occur, the will becomes void and a death not within the contemplated contingency will result in an intestacy.

STATUTORY WILL FORMS.

In order to shorten wills, certain forms known as the statutory will forms have been prescribed under the provisions of S. 179, L.P.A., with the intention that a testator may incorporate these forms by reference in his will. The forms are divided into two parts. Those in Part I may be incorporated by a general reference, while each of those in Part II must if required be specifically mentioned. It remains to be seen how far these forms will be used in practice.

CHAPTER II

EXECUTORS

APPOINTMENT.

An executor may be appointed—

(i) by being expressly named as such in the will.

(ii) by a person authorised by the testator to appoint an executor. (Such person may then nominate himself, unless a contrary intention is indicated by the will.)

(iii) by implication (he is then called "executor according to the tenor"), e.g. where, without express appointment as executor, a person is appointed to pay all just debts of the testator, or a residuary legatee is directed to discharge all lawful demands against the estate. As these are executorial functions, an appointment as executor according to the tenor will be implied. (Unless there is an implication of an intention to appoint a person as executor, it will be necessary for a grant of administration with the will annexed to be taken out, but the executor according to the tenor is entitled to a grant of probate.)

(iv) for a particular purpose, e.g. of property abroad or of parts of the property—he is then called a "Special Executor." There may, of course, be a general executor as well.

By S. 22, A.E.A., a testator may appoint, and in default of such express appointment shall be deemed to have appointed, as his special executors in regard to settled land, the persons (if any) who are, at his death, the trustees of the settlement. This only applies to land settled previous to his death and not by his will. Probate, specially limited to the settled land, may be granted to such trustees.

(v) conditionally, e.g. on the happening of a certain event.

(vi) substitutionally, i.e. in place of another on the happening of a certain event.

(vii) after a certain time or for a certain period—e.g. a son on attaining twenty-one; a widow so long as she remains a widow.

If as a result of any such appointment the executorship is left vacant, whether temporarily or otherwise, administration with the will annexed will be granted.

CESSER OF RIGHT OF EXECUTOR TO PROVE.

The Court may summon any person named as executor in the will to prove or renounce probate of the will.

Where the executor appointed by the will—

(i) survives the testator, but dies without having taken out probate, or

(ii) is cited to take out probate and does not appear to the citation, or

(iii) renounces probate,

his rights in respect of the executorship wholly cease, and the representation to the testator and the administration of his estate shall devolve and be committed in like manner as if that person had not been appointed executor (S. 5, A.E.A.).

WHO MAY BE EXECUTOR.

Anyone may be appointed, but if—

(i) an infant, he cannot act during minority. If an infant is appointed or becomes sole executor, letters of administration with the will annexed will be granted to his guardian or such other person as the Court thinks fit, until he attains twenty-one, when probate may be granted to him (S. 20, A.E.A.).

(ii) of unsound mind, he cannot act while disability continues. If he is sole executor, letters of administration with the will annexed will be granted to his committee ; if there is no committee, then to the residuary legatee or devisee or the lunatic's husband or wife.

(iii) a corporation aggregate—by S. 161 J.(C.)A., the High Court may, where a trust corporation is appointed executor, either alone or jointly with another person, grant probate or administration to such corporation either solely or jointly with another, as the case may require. Formerly, where a corporation was appointed, letters of administration with the will annexed were granted to a syndic or nominee of the corporation. This cannot now be done, and any interest vested in a syndic on 1st January, 1926, vests in the corporation.

(iv) the King, he may nominate another or others ;

(v) the public trustee, he may decline to act ;

(vi) a firm, probate is granted to the members individually ;

(vii) a bankrupt, and there is a solvent executor willing to act, the Court may restrain the bankrupt from acting.

A married woman may be executor, and her husband is not liable unless he has intermeddled in the administration. By S. 170, L.P.A., a married woman may dispose of real or personal property, held by her solely or jointly as personal representative, as if she were a *feme sole*.

ACCEPTANCE OF OFFICE.

An executor may renounce but not after he has once elected to act. His acceptance is shown—

(i) by obtaining a grant of probate.
(ii) by doing any executorial act, e.g. releasing a debt due to the testator. Such acts done in the capacity of agent or attorney for other executors and not as executor will not constitute acceptance, unless he has proved the will.
(iii) by doing acts which would make him, if not appointed executor by the will, liable as executor *de son tort*.

The following do not constitute acceptance :—

(i) Acts justified by necessity, e.g. arranging for funeral ; feeding cattle, etc. ; placing goods of deceased in safety ; making inventory of goods.
(ii) Examining testator's books to decide whether to accept office or not.

Even though probate has been applied for and the oath of office taken, an executor may renounce before the grant is actually made. He cannot renounce after doing acts indicating acceptance.

Acceptance of the executor's office involves acceptance also of the trusts which the testator has imposed on his executor or which arise from the office.

An executor cannot accept in part and refuse in part except as follows—

Settled Land.—Partial renunciation is possible in this case. By S. 23, A.E.A., where settled land becomes vested in a personal representative, who is not a trustee of the settlement, and the settlement was not created by the will, he may—

(i) before representation is granted, renounce in regard to the settled land without renouncing in regard to other property ;
(ii) after representation is granted, apply to the Court to revoke the grant so far as it concerns the settled land only.

The trustees of the settlement, or any person beneficially interested under it, may apply to the Court to appoint a special or additional representative in respect of the settled land.

Normally, the Court is to appoint, as special or additional representatives, the trustees of the settlement provided they are willing to act. An office copy of the order of the Court is to be furnished to the Principal Probate Registry, and a memorandum of the order endorsed on the probate or administration.

The special personal representatives may dispose of the settled land without the concurrence of the general personal representatives, and the latter can dispose of the other property of the deceased without the concurrence of the special personal representatives.

RENUNCIATION.

An executor refuses the office—

(i) by refusing to take his oath ; or
(ii) by not appearing when cited to take probate ; or
(iii) by filing a renunciation in the registry.

Renunciation need not be under seal, but it should be in writing and signed by the party entitled to the grant, and it must be filed in the Principal or a District Registry, and is not effective until filed.

If a person named as executor intermeddles with the estate, he will be liable to a penalty unless he takes probate within six months.

WITHDRAWAL OF RENUNCIATION.

Renunciation may be retracted—

(i) before it is filed and recorded in the registry (Morant, in the goods of, 3 P. & D. 151) ;
(ii) after filing, with consent of Court, if for the benefit of the estate or of those interested under the will.

By S. 6, A.E.A., where withdrawal of renunciation is allowed and the executor proves the will, the probate shall not prejudice any act of any other personal representative who had previously proved or taken out letters of administration. A memorandum of the subsequent probate must be endorsed on the original probate or letters of administration.

DEVOLUTION OF EXECUTOR'S OFFICE.

(i) On the death of one of several executors, the office continues in the survivor or survivors. The executor of the deceased executor has, in such a case, no interest at all.

(ii) On the death of a sole or last surviving executor, the office devolves on his executor, provided that—

(*a*) the deceased executor had proved the will ;
(*b*) if the deceased executor left another executor of the original testator who afterwards proves, the rule ceases to apply on such probate being granted.

(iii) So long as the chain of such representation is unbroken the last executor in the chain is the executor of every preceding executor.

(iv) The chain is broken by—

(*a*) an intestacy ; or
(*b*) the failure of an executor-testator to appoint an executor ; or
(*c*) failure to obtain probate of a will.

(v) It is not broken by a temporary grant of administration if probate is subsequently granted.

(vi) Every person in the chain—

(*a*) has the same rights in the testator's estate as the original executor would have had if living ;
(*b*) is, to the extent to which the testator's estate has come to his hands, answerable as if he were an original executor (A.E.A., S. 7).

An executor of an executor who accepts office cannot renounce the executorship of the former testator.

On the death of an administrator, there is no devolution. A fresh grant of administration must be obtained.

HOW THE GRANT OF PROBATE IS OBTAINED.

It should be borne in mind that a grant of probate cannot now be obtained by more than four persons. Where more than four are named in the will, the grant will be made to four only, and power will be reserved for the others to come in and obtain a grant on the occurrence of vacancies.

There are two modes of proving a will, called, respectively, proof in Common form, and proof in Solemn form. The former is by far the more usual and ordinary mode, but if a will is only proved in Common form, the executors may at some future date be called upon to prove in Solemn form. Proof in Solemn form is required where there is a dispute as to the validity of a will or opposition to it. It is proof *per testes*, i.e. by witnesses, and once the will is so proved the executors cannot be called upon to prove it again.

PROOF IN COMMON FORM.

This is obtained either at the Principal Probate Registry of the Probate Division of the High Court or at a District Registry. Application is made by the executor in person or by a solicitor acting for him. The executor's oath must be prepared and sworn as an affidavit. This is the document furnishing the information on which a grant of probate is based. Its contents are :—

(i) The name, address and occupation of the executors.
(ii) A statement that the paper annexed contains the true and last will of the deceased. Any codicil or codicils must be mentioned, and also the number of codicils, if more than one. The name of the deceased must, of course, be given.
(iii) The day and place of the testator's death.
(iv) That the persons swearing the oath are the executors named in the will.
(v) Their relationship (if any) to the deceased.
(vi) That they will well and faithfully administer according to law.
(vii) That they will exhibit a true and perfect inventory of the estate and render a just and true account thereof, whenever required by law so to do.
(viii) The gross value of the estate.
(ix) A statement as to any executors named who have renounced.
(x) In the case of a death after 1925, it must be stated whether there was land vested in the deceased which was settled previously to his death and not by his will.

In addition to the executor's oath, an affidavit for the Inland Revenue Commissioners must be sworn by the executor or some other competent person in the prescribed form. This affidavit shows all the property in respect of which estate or other death duty is payable and all the property passing upon the death of the testator.

A copy of the will and codicils is engrossed. The duties must be paid and the documents, including the original will and codicils, and the engrossment and the instrument of renunciation signed by the executors who have renounced (if any), are left at the probate registry, and, in due course, the official certificate of probate will be annexed if the will is perfect on its face and bears an attestation clause stating that the statutory requirements have been complied with. If this clause is omitted, further affidavit evidence may be required.

Where the will bears the testator's mark instead of a signature, an affidavit of due execution is required.

Without special order—

(i) neither probate nor letters of administration with the will annexed can be obtained until after seven days from the death ;

(ii) letters of administration cannot be obtained until after fourteen days from the death.

Apart from this, the time within which probate must be taken is not laid down. If the executor intermeddles he must obtain probate within six months. If the first application is made after the lapse of three years, the reason for the delay must be certified to the Registrars, who may require proof of the cause of delay (P.R.(N.C.), R. 45).

LIMITED GRANTS.

These are made—

(i) where an executor is appointed for a special purpose ; or

(ii) where a separate executor is appointed for the purpose of a codicil ; or

(iii) where the will is lost, probate of its contents being limited until the original is produced ; or

(iv) to special executors with regard to settled land.

SECOND GRANTS.

These occur where—

(i) by the will, another person is, in a certain event, to be substituted for the original executor ; or

(ii) a person dies who took a grant in place of a person under disability ; or

(iii) a lost will is subsequently found, a limited grant having been previously made ; or

(iv) a codicil is found after probate.

DOUBLE GRANTS.

These are made where one or some of several executors have obtained probate and the other or others desire a grant.

PROBATE IN SOLEMN FORM.

A probate action is commenced and all parties interested (including those who would be interested if there were an intestacy) are cited to appear, the object being to establish the validity or otherwise of the will.

The next of kin are entitled to require proof in solemn form.

The action may be brought in the Probate Division of the High Court, but the County Court has jurisdiction where the personal estate is under £200 and the Real Estate under £300.

Where the will has been proved in solemn form, the executor's oath will recite the order of the Court by which the validity of the will has been established.

CHAPTER III

ADMINISTRATORS

REPRESENTATION to the estate of a person who dies intestate is obtained by a grant of Letters of Administration. It must be shown that there is property in this country to be distributed. A joint grant is seldom made.

NUMBER OF REPRESENTATIVES.

By S. 160, J.(C.)A.—

(i) probate or administration shall not be granted to more than four persons in regard to the same property.

(ii) If there is a minority, or a life interest arises under the will or intestacy, administration shall be granted either to a trust corporation, with or without an individual, or to not less than *two* individuals.

WHO IS ENTITLED TO THE GRANT.

By S. 162, J.(C.)A., in granting letters of administration, the Court shall have regard to the rights of all persons interested in the deceased's estate. In particular, administration with the will annexed may be granted to a devisee or legatee, and in regard to settled land not settled by the will, to the trustees of the settlement. Where the deceased was wholly intestate, the grant is to be made, unless there are special reasons to the contrary—

(i) to one or more of those interested in the residuary estate ;

(ii) in the case of settled land, to the trustees of the settlement.

Certain persons have prior rights to a grant, and the Court will not make a grant *per saltum*, i.e. will not pass over those with prior rights, without reason.

A person entitled to a grant may renounce the right. Renunciation may be retracted before administration has passed the seal, subject, however, to a discretion in the Court to allow such renunciation.

A limited administration will not be granted except by direction of the judge—

(i) to persons entitled to general grants ; or
(ii) to other persons unless every person entitled to the general grant has consented or renounced or has been cited and failed to appear (P.R.(N.C.), R. 29).

As a general rule, no person who renounces administration in one character, is to be allowed to take representation in another character.

PRIORITIES.

Where the deceased left a will, the following is the order of priority of right to a grant of probate or administration with the will annexed :—

1. Executors.
2. Residuary legatees or devisees in trust.
3. Residuary legatees or devisees for life.
4. Ultimate residuary legatees or devisees or, where the residue is not wholly disposed of, the persons entitled upon an intestacy.
5. The presonal representatives of persons indicated in 4.
6. Legatees or devisees or creditors.
7. Contingent residuary legatees or devisees, or contingent legatees or devisees or persons having no interest in the estate who would have been entitled to a grant had the deceased died wholly intestate.
8. The Crown. (P.R.(N.C.), R. 119.)

Where the deceased died wholly intestate, the following is the order of priority of right to a grant of administration :—

1. Husband or wife.
2. Children or other issue of the deceased, taking *per stirpes*.
3. Father or mother.
4. Brothers and sisters of the whole blood or the issue of deceased brothers and sisters of the whole blood, taking *per stirpes*.
5. Brothers and sisters of the half blood or the issue of brothers and sisters of the half blood, taking *per stirpes*.
6. Grandparents.
7. Uncles and aunts of the whole blood or the issue of deceased uncles and aunts of the whole blood, taking *per stirpes*.
8. Uncles and aunts of the half blood or the issue of deceased uncles and aunts of the half blood, taking *per stirpes*.
9. The Crown.
10. Creditors. (P.R.(N.C.), R. 120.)

Other things being equal, males are preferred to females, and a man accustomed to business has preference. A creditor to whom administration is granted is required by his bond not to prefer his own debt.

MODE OF OBTAINING ADMINISTRATION.

(*a*) The Oath.

Persons applying for administration must lodge the Inland Revenue affidavit and take the oath for due administration of the estate. The oath must show the applicant's title to administer, his relation to the deceased, and how the prior interests have been cleared off. It must contain the description of the intestate and state the gross amount of the estate. It must also state whether there was land vested in the deceased which was settled previous to his death, and the trustees thereof must be cleared off. It contains similar provisions to the executor's oath, as to well and truly administering, and as to exhibiting an inventory when called upon.

(*b*) The Administrator's Bond.

A bond must be given for due administration by every person obtaining a grant, except by the Public Trustee or the Solicitor to the Treasury. If the Public Trustee and another person apply for a grant, a bond will be required from the other person.

The bond is conditioned upon—

(i) the making, when lawfully called upon, of a true and perfect inventory of the estate which comes to his hands, and exhibiting it in the principal probate registry ;
(ii) the administering well and truly of the estate ;
(iii) the making of a just and true account of the administration whenever required by law to do so ; and
(iv) the delivering up of the Letters of Administration in the event of a will being brought in for probate.

A creditor will further be required not to prefer his own debt. The bond is sworn before an officer of the registry or a commissioner of oaths. The penalty of the bond is double the value of the estate.

(*c*) Sureties.

Two sureties are required, unless the estate is under £50 in value, or the Registrar otherwise directs. Sureties are dispensed with (i) where the administrator is (*a*) a public official or (*b*) (unless the registrar otherwise directs) a Trust Corporation having its principal office within the jurisdiction, or (ii) where the property is in Court.

Where the condition of the bond is broken, the Court may order it to be assigned, and the assignee may sue on the bond, but anything he recovers he holds for all parties interested. The condition to well and truly administer is broken if the administrator converts any of the estate to his own use or distributes the estate without making proper provision for legacies payable at a future date.

SPECIAL AND LIMITED GRANTS OF ADMINISTRATION.

Administration cum Testamento Annexo is granted where a person dies testate (i.e. having left a valid will) but without having appointed an executor, or where his appointment of an executor fails because—

(i) The executor predeceases the testator or dies without proving the will ; or
(ii) The executor renounces or does not appear to a citation to take probate ; or
(iii) The executor by reason of infancy or unsoundness of mind is incapable of obtaining a grant.

It is also made where the executor's appointment is to take effect after an interval.

Administration de Bonis Non Administratis is granted where a sole or last surviving executor dies intestate, or a sole or last surviving administrator dies without having fully administered. The usual affidavit for Inland Revenue purposes must be prepared and the applicant must take the oath, and a bond must be filed as on an application for a first grant.

Administration Durante Minore Ætate is granted where the sole executor appointed by the will, or the person who would have the right to administer in case of intestacy, is under age. A grant is made to his guardian, or such other person as the Court thinks fit, until the infant attains twenty-one. A grant may be made to the minor on his coming of age.

By S. 165, J.(C.)A., the appointment of an infant to be an executor does not transfer any interest to the infant, or constitute him a representative for any purpose, until probate is granted to him after he has attained full age.

Administration Durante Absentia is granted where the executor or, on an intestacy, the person entitled to a grant of administration is out of the jurisdiction. The Court may then grant administration to another during his absence. The grant is for the use and benefit of the person entitled until he applies for and obtains probate or letters of administration

By S. 164, J.(C.)A., if representation has already been taken out, then if, at the expiration of twelve months from the

death, the executor or administrator is out of the jurisdiction, a grant *durante absentia* may be made on the application of a creditor or person interested in the estate.

Administration Durante Dementia is granted where the sole executor or person entitled to administration is of unsound mind, or where the executor is so seriously ill that he cannot be served with a citation to accept or refuse probate. The grant is made to another and is limited to the period of incapacity. The committee of a lunatic will generally be appointed. Where a receiver of the lunatic's property has been appointed under S. 116, Lunacy Act, 1890, he may obtain a grant, but the Court has a discretion.

Administration Pendente Lite may be granted under S. 163, J.(C.)A., where any legal proceedings touching the validity of a will or for obtaining, recalling or revoking any representation are pending. The Court may then grant administration to an administrator, who shall have all the rights and powers of a general administrator except that of distributing the residue. He is under the control of the Court, and acts under its direction. He may be allowed reasonable remuneration by the Court out of the estate.

Administration ad Litem is granted with a view to commencing or carrying on proceedings in the Chancery Division. It is made for the purpose of representing the estate and so of binding the estate in such proceedings. By O. XVI. R. 46, R.S.C., however, the Court may appoint some person to represent the estate or proceed in the absence of any such person. This renders the appointment of an administrator *ad litem* in many cases unnecessary.

Administration ad Colligenda Bona Defuncti is granted for the purpose of getting in and preserving the assets of a deceased person where delay in obtaining the full grant might be detrimental to the estate. It is usually limited to the collection of the personal estate of the deceased, giving discharges for debts and preservation of assets either by investing or by paying into Court.

Miscellaneous Grants.

(i) Where a will is lost administration may be granted limited until it is found.

(ii) Grants may be limited in respect of trust estates and settled land.

(iii) *Cessate* grants are made where a limited grant has ceased, and it is necessary that the estate should be represented.

(iv) A grant *cæterorum* is made where the original grant was made limited to part of the estate, and a further grant with regard to the remainder is necessary.

THE EFFECT OF PROBATE AND ADMINISTRATION.

The only legal evidence of the will is the probate or letters of administration with the will annexed, and a plaintiff, in order to sue in respect of the estate of an intestate, must have obtained a grant of letters of administration.

Probate and letters of administration are conclusive as to the validity of the will, and as to the intestacy of the deceased, respectively, but strictly not even *prima facie* evidence of the death. They are *prima facie* evidence of the domicile of the deceased.

Probate granted to one of several executors enures for the benefit of all.

REVOCATION OF GRANT.

The grant may be revoked :—

(i) Where obtained on a false suggestion (*falsa demonstratio*) whether fraudulent or not, e.g. where obtained by a woman alleging herself to be the widow of the deceased, but who was not legally married (this would not invalidate a grant of probate where the woman was appointed executor and referred to as "my wife"); or where probate of the will of a living person has been obtained.

(ii) Where a will is discovered after letters of administration have been granted.

(iii) Where, after a grant of probate, a later will, or a codicil, making a fresh appointment of executors, is discovered.

(iv) Where the executor or administrator becomes incapable of acting through insanity or ill-health, or when the administrator has disappeared.

(v) Where an executor who has proved in common form fails, when called upon, to prove in solemn form.

(vi) Where the grant is successfully appealed against.

(vii) Where administration is taken out within fourteen days of death.

(viii) Where administration is granted, pending a *caveat*.

(ix) Where a limited administration has been granted to the owner of a limited interest, who has assigned that interest.

EFFECT OF REVOCATION.

Where a grant is revoked while any legal proceeding is pending by or against an administrator, the Court may direct that the proceedings be continued by or against the new personal representative (S. 17, A.E.A.).

Every person making any payment or disposition in good faith under a grant of probate or administration shall be indemnified and protected in so doing, notwithstanding any defect or circumstances whatsoever affecting the validity of the grant (S. 27 (1), A.E.A.).

Where a grant is revoked, all payments and dispositions made in good faith to a personal representative under the representation, before revocation of the grant, are a valid discharge to the person making them. The personal representative who acted under the revoked grant may retain and reimburse himself in respect of any payments or dispositions made by him which the person to whom representation is afterwards granted might have properly made (S. 27 (2), A.E.A.).

The old distinction between a grant which was voidable only, and a grant which was void *ab initio*, was of little importance, and it probably no longer exists, except, perhaps, where a grant has been made and the supposed deceased person is still alive. The effect of a grant being declared void *ab initio* was to invalidate all acts done under it.

CHAPTER IV

THE INTEREST TAKEN BY THE PERSONAL REPRESENTATIVES

REAL AND PERSONAL ESTATE.

Both devolve on the personal representative, but in the case of intestacy, the real and personal estate, until administration is granted, vest in the President of the Probate Division (S. 9, A.E.A.).

The following, under S. 3, A.E.A., are interests ceasing on death, and do not devolve on the personal representatives—

(i) an entailed interest not disposed of by will ;
(ii) the interest of the deceased under a joint tenancy where another tenant survives the deceased ; and
(iii) the interest of a corporator sole in the corporation's estate. This applies to the Crown.

The following will devolve on the personal representatives—

(i) trust property, including settled land, but, as has been seen, the trustees of the settlement may be appointed special representatives in respect thereof ;
(ii) a gift of real estate by will exercising a general power to appoint by will, and
(iii) entailed interests disposed of by will.

A CONVEYANCE OF REAL ESTATE may be made only by—

(i) all the personal representatives, or
(ii) an Order of the Court, or
(iii) the proving executor or executors for the time being, or
(iv) the special representatives appointed for settled land so far as the settled land is concerned (S. 2 (2), A.E.A.).

PARTNERSHIP PROPERTY.

The right of survivorship does not apply, and the representatives of a deceased partner are, in the absence of agreement, entitled to have the business wound up and disposed of, and have a lien on the assets in respect of the deceased partner's share, but not on specific assets so as to prevent realisation.

DONATIO MORTIS CAUSA is a gift, made in contemplation of death, delivered to the donee, and conditioned to take effect only if the death of the donor follows. Such a gift does not vest in the personal representative or require his consent. It is liable to legacy duty and estate duty; and is bad against creditors.

CHOSES IN ACTION.

Rights of action founded on any obligation, contract, debt, covenant, or other duty survive to the personal representative, but purely personal actions do not survive, on the principle "*Actio personalis moritur cum persona.*"

The personal representative may have his name entered on the register of a company as a member in place of the deceased.

By the Fatal Accidents Act, 1846, the personal representative may, for the benefit of the near relatives of one whose death has been caused by another's neglect or default, maintain an action against the party responsible.

Rights of action of a dependant of a deceased workman pass, under the Workmen's Compensation Act, 1926, to the dependant's representatives.

The personal representative is bound by the deceased's contracts, except where the contract is of a purely personal character, e.g. as between master and servant or principal and agent.

S. 26, A.E.A., provides that the personal representatives—

(i) shall have the same right of action as the deceased would have had for any debt (including arrears of rent) due to deceased and for any injury to or right in respect of his personal estate in his lifetime;

(ii) may maintain any action which deceased could have maintained for injury to his real estate committed within six months before his death; (Action must be brought within twelve months of death; damages recovered are part of personal estate.)

(iii) may distrain for arrears of a rent charge;

(iv) may distrain for arrears of rent, even after the termination of the tenancy, if made within six months of such termination and the tenant from whom arrears are due is still in possession;

(v) is liable to an action for a wrong committed by deceased within six months of his death to another's real or personal property, if the action be brought within six months after representation has been taken out.

The personal representatives, of course, may litigate in respect of rights of action accruing after the death regarding the deceased's estate.

PATENTS.

By S. 43, Patents and Designs Act, 1907, if a person possessed of an invention die without applying for a patent, his personal representative may apply within six months of the death.

EXECUTOR AS TRUSTEE.

If property is specifically bequeathed to an executor on trust, and he assents to the bequest, the property ceases to be part of the testator's assets and he becomes a trustee of it. He cannot thereafter deal with it or make a title to it as executor, but only as trustee (Attenborough *v.* Solomon, 1913, A.C. 76).

CHAPTER V

THE POWERS, DUTIES, AND LIABILITIES OF EXECUTORS AND ADMINISTRATORS

ACTS OF AN EXECUTOR BEFORE PROBATE.

The executor's authority is derived from the will, and the testator's property vests in him as from the date of the death. The grant of probate does not operate to confer authority upon him, but merely evidences the fact that he has such authority. It follows, therefore, that even before obtaining a grant, an executor may do all things in due course of administration up to the point at which it becomes necessary to produce the only legal evidence of his authority. He may thus commence an action before probate, but he cannot go beyond the stage at which proof of his right to sue as executor becomes necessary. He can get in the estate, release debts, etc., and if he has elected to act, he may be sued.

ACTS OF AN ADMINISTRATOR BEFORE GRANT.

These stand on a different footing, as the administrator's title is derived from the grant, and until it has been obtained, the deceased's property does not vest in him, but in the President of the Probate Division (S. 9, A.E.A.).

Upon the grant being made, the administrator's title relates back to the date of the death, and any dispositions of the property made before the grant will be valid if made for the benefit of the estate and in due course of administration. Such dispositions by a person who does not ultimately obtain a grant may be ratified by the administrator who is actually appointed.

POWERS OF EXECUTORS AND ADMINISTRATORS.

All powers of a personal representative may be exercised by the proving executor or executors for the time being (S. 8, A.E.A.), and except as regards the conveyance of real estate, as to which see S. 2, A.E.A., *supra*, the act of one executor

or administrator is as effectual as if all had joined (but it is doubtful if one can pay a statute-barred debt against the will of the others (Midgley *v.* Midgley, 1893, 3 Ch. 282)).

On an intestacy, there is an over-riding trust for sale.

The personal representatives have, *inter alia*, the following powers :—

(A) Sale of Assets.—Any of the property of the deceased may be sold or assigned. The receipt of a personal representative is a good discharge. A purchaser from an executor is not bound to inquire whether debts have been paid even after more than twenty years from the death (*re* Venn and Furze, 1894, 2 Ch. 101). But if he does not purport to sell as executor, and the purchaser did not know he was executor (e.g. where by assent he has ceased to be executor and become trustee), the purchaser cannot, in order to support the contract, rely on the fact that the vendor was an executor. (Attenborough *v.* Solomon, 1913, A.C. 76, where the executors had by an assent ceased to be executors and become trustees.)

(B) Mortgage.—Similar rules apply to mortgages by the representative. The mortgagee may, of course, be given a power of sale. Fraud will upset both sales and mortgages, and a personal representative may not sell to himself, or to a trustee for him, any part of the assets.

(C) Investment.—Subject to contrary directions in the will, personal representatives may invest trust funds in their hands in any of the securities authorised by S. 1, T.A., and may from time to time vary such investments. [See Appendix II.]

They are not liable for breach of trust by reason only of continuing to hold an investment which has ceased to be an investment authorised by the will, or the Act (S. 4, T.A.).

Unless authorised by the will, they may not invest on personal security, nor on second or contributory mortgages.

By S. 7, T.A., a trustee (including a personal representative) may, unless expressly prohibited by the will, retain or invest in securities to bearer, which, if not bearer securities, would have been authorised investments. But until sold they must be deposited with a bank for safe custody and collection of income, unless the trustee is a trust corporation. A trustee will not be responsible for any loss incurred by such deposit, and any sum payable in respect of such

deposit and collection is to be paid out of the income of the trust property.

A direction in the will that investments shall be retained or made in the name of a trustee is not to be deemed to be an express prohibition excluding the operation of this section.

By S. 10, T.A., upon a sale of a fee simple or a term of at least 500 years, personal representatives may allow to remain, on mortgage, two-thirds or less of the purchase money.

Where they lawfully hold securities of a company, the personal representatives may agree to a reconstruction or amalgamation of the company, or a sale of the property and undertaking of the company, or the release, modification, or variation of rights attached to the securities, amd may accept and retain any new securities in lieu of the old.

If any preferential right to subscribe for any securities is offered in respect of their holding in a company they may either (*a*) accept and pay for the securities out of the estate, or (*b*) renounce the right, or (*c*) sell it, even to a beneficiary. If they sell such rights, the proceeds of sale will be held as capital. They will not be liable for any loss where they act in good faith.

(D) Appropriation.—Wide powers of appropriation exist in the personal representative. By S. 41, A.E.A., he may appropriate any part of the real or personal estate including things in action, in its actual condition or state of investment at the time of appropriation, towards satisfaction of a legacy or of any other interest or share in the property.

Such appropriation—

(i) must not prejudicially affect any specific devise or bequest ; and

(ii) must not be made (*a*) without consent * of the person who is absolutely and beneficially entitled to possession, or (*b*) if the proposed appropriation is in respect of a settled legacy, share or interest, without the consent * of the trustee thereof, or the person who may for the time being be entitled to the income.

* Such consent is dispensed with—

(i) in case of a person who comes into existence after the time of appropriation, or who cannot be found or ascertained at that time (but the personal representative must have regard to the rights of such person) ;

(ii) in case of a lunatic or defective, where no committee or receiver has been appointed ;

(iii) in case of a settled legacy, share or interest, if there is no trustee other than the personal representative and no person of full age and capacity entitled to the income.

NOTE.—In cases (ii) and (iii) the appropriation must be of an investment authorised by law or by the will.

(E) SALES BY AUCTION.—By S. 12, T.A., trustees having a power or trust for sale may sell, either together or in lots, by public auction or private contract. They may buy in at any auction.

(F) LEASES.—For giving effect to beneficial interests, the personal representatives may demise land for a term of years to trustees to raise money for which the land is liable, or may grant a rent charge for giving effect to any annual or periodical sum for which the land is liable (S. 40, A.E.A.).

Otherwise leases and sub-leases are not a recognised way of dealing with the assets, and, when granted, persons so taking must show that the act was for the benefit of those beneficially interested in the estate.

(G) COMPROMISES.—Personal representatives may make compromises, allow time for payment of debts, pay debts on such evidence as they think sufficient, submit to arbitration, and settle any claims relating to the estate (S. 15, T.A.).

(H) BILLS OF EXCHANGE.—They may indorse, assign, present or pay bills of exchange and promissory notes of the deceased.

(I) TRUSTS.—The personal representatives of a sole trustee, or of the last surviving or continuing trustee, may exercise or perform any power or trust which was given to or capable of being exercised by the deceased (S. 18, T.A.).

(J) EMPLOYMENT OF AGENTS.—By S. 23, T.A., personal representatives are given a wide power of delegation. They may employ and pay an agent to transact any business required in the administration of the estate, and will not be liable for the agent's default if employed in good faith. They may appoint an agent or attorney to sell, manage or administer any

property outside G.B. and N.I., and may delegate the receipt of money to a solicitor or the receipt of insurance money to a solicitor or banker.

By S. 25, T.A., a trustee or personal representative intending to remain out of G.B. and N.I. for more than one month, may, by power of attorney, delegate to any person, including a trust corporation, the execution or exercise, during his absence, of all or any trusts, powers and discretions vested in him, either alone or jointly with any other person. A person who is the only other co-trustee, and not being a trust corporation, cannot be appointed attorney. The trustee or personal representative is liable for the acts or defaults of the attorney as if they were his own.

The power of attorney must be attested and filed in the Central Office of the Supreme Court within ten days after execution, together with a statutory declaration.

(K) Carrying on the Business.—Apart from express provisions in the will, the personal representatives may not carry on the business of the deceased except so far as is necessary for its beneficial realisation. Even if they do no more than this, they are personally liable for debts, but are entitled to be indemnified against such liabilities. Where there are express directions by the testator that the business be carried on by the personal representatives, the latter are entitled to an indemnity out of the assets which he has directed to be employed in the business. If the personal representatives carry on the business by direction of the beneficiaries, their indemnity extends to the whole estate, and they may, of course, be merely agents of the beneficiaries and thus free from personal responsibility altogether.

Where the business is so carried on, creditors whose debts are incurred after the date of death are entitled to be subrogated to the rights of the personal representatives, but this does not exclude the creditors' rights against the executors personally. Those personal rights arise from the contract between the personal representatives and the creditors, who are entitled to sue the contracting party.

Where the business is carried on merely for the purposes of realisation, any profit or loss must be apportioned between the tenant for life and the remainderman.

THE DUTIES OF THE REPRESENTATIVE.

1. The Funeral.—Executors are *prima facie* entitled to the possession of the body, and are responsible for its burial (or cremation).

   Proper funeral expenses (dependent upon the station in life of the deceased) are payable out of the estate in priority to all other charges. Only reasonable expenses are allowed where the estate proves insolvent.

   Funeral expenses do not include the provision of a tombstone or memorial unless directions are given in the will and the estate is solvent.

   Though there is no property in a dead body, directions in a will with regard to the anatomical examination of the body after death must be complied with (Anatomy Acts, 1832, 1871).
2. The Inventory.—The personal representatives must, when lawfully required so to do, exhibit on oath in the Court a true and perfect inventory and account of the real and personal estate of the deceased (A.E.A., S. 25).

   Any interest in the estate is sufficient to support an application for an inventory.
3. Getting in of the Estate.—The executors, in general, have a year in which to realise investments which it is not proper for them to retain. This is not a fixed rule, and where they have retained beyond the year in the honest exercise of their discretion, they will not be liable for loss caused by the postponement of sale.

   They must get in, as soon as possible, all moneys of the deceased outstanding upon personal security only. Money outstanding on such a mortgage of real property as is authorised by the T.A. need not be got in unless required for payment of debts or other testamentary purposes or unless the security is in jeopardy.
4. Wasting or Reversionary Property.—Where the deceased has bequeathed such property for successive interests, it must be sold so that neither the tenant for life nor the remainderman may be prejudiced (Howe *v.* Earl of Dartmouth, 7, Ves. 137). But see p. 32.

   The rule in this case is as follows :—

   Where there is

   (*a*) a residuary bequest

   (*b*) of personal estate

   (*c*) to be enjoyed by several persons in succession,

   a Court of Equity, in the absence of any evidence of a contrary intention, will assume that it was the intention of the testator that his legatees should enjoy the same thing in succession, and, as the only means of giving

effect to such intention, will direct the conversion into permanent investments of a recognised character of all such parts of the estate as are of a wasting or reversionary character, and also all such other existing investments as are not of the recognised character, and are, consequently, deemed to be more or less hazardous.

5. Investment.—Unless directed by the will to invest, money of the testator may be left temporarily with bankers, provided it is kept on a separate account, either on deposit or other account (S. 11, T.A.).

   Any sums of sufficient amount should be invested; and, where directed by the will to invest, the representative must comply, though he may retain at the bank a sufficient sum for purposes of administration.

6. Advertising for Claims.—Advertisements should be inserted in the *London Gazette* and in a daily London newspaper, and, if deceased resided outside London, in a local newspaper also.

   After the time limited by the advertisement, which must not be less than two months, the personal representative may proceed to distribute the estate, and is not then liable in respect of claims of which he had no notice; but this does not prejudice the right of a creditor to follow the property into the hands of a person other than a purchaser for value, nor relieve the personal representative from making such searches as a purchaser should make (S. 27, T.A.).

   Note.—The executor's year does not apply to the payment of debts. He is liable to be sued immediately for these.

7. Accounts and Audit.—Clear and distinct accounts of the property must be kept, and these must be open to inspection by a beneficiary or by his authorised solicitor. A legatee cannot demand a copy at the expense of the estate.

   By S. 22 (4), T.A., trustees, including personal representatives, may, in their absolute discretion from time to time, but not more than once in every three years (unless in exceptional circumstances), cause the accounts of the trust property to be examined and audited by an independent accountant; and shall for that purpose produce such vouchers and give such information to him as he may require. The costs of such audit, including the fee of the auditor, shall be paid out of the capital or income of the trust property, or partly in one way and partly in another as the trustees, in their absolute discretion, think fit. In default of any direction by the

trustees to the contrary in any special case, costs attributable to capital shall be borne by capital and those attributable to income by income.

LIABILITY OF PERSONAL REPRESENTATIVE.

A personal representative commits a devastavit where, by any negligence in getting in or investing the estate, a loss is incurred. He is liable to make good any such loss; but it must have been caused by negligence or culpable omission, i.e. there must have been a breach of his duty as executor or administrator. S. 29, A.E.A., provides that where a person as personal representative (including an executor *de son tort*) wastes, or converts to his own use, any part of the estate and then dies, his personal representative shall, to the extent of the available assets of the defaulter, be liable and chargeable in respect of such waste or conversion in the same manner as the defaulter would have been if living.

REMUNERATION.

Except as provided by the will an executor is not entitled to remuneration, but he is not required to do professional work which could not be undertaken by an ordinary executor. The will may authorise an executor to make usual professional charges, but such charges can only extend to professional work, and in so far as they consist of profits apart from out-of-pocket expenses, they are a legacy, and as such cannot be recovered where the estate is insolvent (Pennell *v.* Franklin, 1898, 2 Ch. 217).

EXECUTOR "DE SON TORT."

An executor *de son tort* is one who, without having been appointed executor or without having obtained a grant of administration, intermeddles with the estate of a deceased person.

NOTE.—The term is used equally in cases of intestacy as in cases of testacy. There is no such term as "administrator *de son tort*" known to the law.

Slight acts of intermeddling with the assets denoting an assumption of authority or an intention to exercise the functions of an executor may make a person executor *de son tort*, e.g. demanding payment of debts due to deceased; disposing of his goods; carrying on his business; but merely, in circumstances of necessity, giving directions for the funeral or placing goods in safety or making an inventory of them will not fix a person with liability as executor *de son tort*.

LIABILITIES AND RIGHTS OF EXECUTOR "DE SON TORT."

(i) He may be sued by the rightful executor or administrator or by a creditor or beneficiary.
(ii) He is not liable for more than has come to his hands.
(iii) As against the rightful representative he may set off payments made by him in due course of administration.
(iv) As against a creditor he may plead *plene administravit* or that before action brought, he has handed over to the rightful representative all the assets in his hands or has settled accounts with him.
(v) He is liable for the payment of legacy, succession, and estate duties in respect of the property which he has administered.
(vi) He can plead the statute of limitations in a proper case.
vii) He cannot be compelled to take out letters of administration (unless named executor in the will, when he is not strictly executor *de son tort*).
(viii) By S. 28, A.E.A., he may set off against his liability "any debt for valuable consideration and without fraud due to him from the deceased person at the time of his death." Otherwise he has no right of retainer.

See page 29. Where a testator left the residue of his estate to trustees upon trust to sell and convert, with power to postpone, and the residue consisted, *inter alia*, of leaseholds, it was held, in *re* Brooker: Brooker *v.* Brooker (1926, Acct. L.R. 21), that in view of S. 28 (2) and 28 (5), L.P.A., and of the definition of "land" in S. 205 (1) (ix), L.P.A., it seemed that the principle laid down in Howe *v.* Earl of Dartmouth (1802, 7, Ves. 137*a*) hitherto applied by Courts of Equity during the period of the postponement of the sale of leasehold properties held in trust for sale, no longer applied to this case, and from and after 1st January, 1926, the tenant-for-life was entitled to the net income actually produced.

CHAPTER VI

THE ADMINISTRATION OF THE ASSETS OF DECEASED

ASSETS FOR PAYMENT OF DEBTS.

By S. 32, A.E.A., all the real and personal estate, whether legal or equitable, of a deceased person, to the extent of his beneficial interest therein, and the real and personal estate of which he disposes by will under a general power (including the statutory power under S. 176, L.P.A., to dispose of entailed interests) are assets for the payment of his debts and liabilities. This, of course, is not to prejudice incumbrancers.

NOTE.—Entailed interests not disposed of by will are still not liable for deceased's debts.

Any disposition by will inconsistent with S. 32, A.E.A., is void as against creditors.

TRUST FOR SALE ON INTESTACY.

If a person dies intestate as to any real or personal estate, such estate is held by his personal representatives on trust—

(i) to sell real estate ; and

(ii) to call in, sell, and convert into money such part of the personal estate as does not consist of money.

The personal representatives have power to postpone such sale and conversion for such period as they think proper.

Unless there are special reasons for sale—

(i) reversionary interests may not be sold until they fall into possession ;

(ii) personal chattels may not be sold unless there is a deficiency of other assets, (See *infra* for definition of personal chattels.)

SOLVENT ESTATE.

If the estate is solvent, the proceeds of sale *plus* any ready money of the deceased will be applied in a payment of—

(i) the costs of realisation ;

(ii) the funeral, testamentary and administration expenses ;
(iii) debts ;
(iv) pecuniary legacies (if any) bequeathed by the will (If there are other legacies the trust for sale will not apply to their subject-matter except so far as is necessary for the payment of debts, etc.) ;
(v) residue to those beneficially entitled thereto.

Testamentary Expenses mean expenses incident to the proper performance of the duties of the representative, and include costs of obtaining advice of solicitors or counsel as to distribution, estate duty, etc.

Pending the Distribution of the estate, or during the minority of any beneficiary, or while any life interest subsists, the undistributed residue may be invested in trust securities. These investments may from time to time be varied for other trust securities.

INSOLVENT ESTATES.

Where the estate is insolvent—

(*a*) Funeral, testamentary and administration expenses have priority.
(*b*) Subject thereto, the bankruptcy rules for the time being prevail, and are to be observed as to
(i) the respective rights of secured and unsecured creditors ;
(ii) debts and liabilities provable ;
(iii) the valuation of annuities and future and contingent liabilities, respectively ; and
(iv) the priorities of debts and liabilities (S. 34, A.E.A.).

The bankruptcy rules must now be observed, whether the estate is being administered by the Court or out of Court.

S. 130, Bankruptcy Act, 1914, was repealed by the A.E.A., but was re-enacted by the Expiring Laws (Continuance) Act, 1925.

RETAINER AND PREFERENCE.

A personal representative has a right to retain a debt due to himself in priority to other debts of equal degree. This right may be exercised in respect of all assets of the deceased. It applies, however, only to debts owing to him in his own right, whether solely, or jointly with another person. Debts owing to him as trustee for another cannot now be retained ; nor can he apparently retain a debt owed to a trustee for him (S. 34(2), A.E.A.).

Among creditors of equal degree, an executor may pay one in preference to another. Simple and specialty debts are on the same footing in this respect.

If a judgment or order for administration has been pronounced, the right of preference ceases. The right of retainer may, however, still be exercised out of assets which come to the personal representative's hands. This latter right is not lost by paying the assets into Court; but there is no right to retain out of assets got in by a receiver appointed by the Court (Calver *v.* Laxton, 31, C.D. 440). An executor who, being surety for the testator, pays the debt, may retain in respect of it.

Retainer may be exercised for a statute-barred debt, but not for one unenforceable under the Statute of Frauds.

A creditor-administrator is required by the terms of his bond not to prefer or retain.

The necessity for distinguishing between legal and equitable assets for the purpose of the exercise of the right of retainer probably no longer exists.

Legal assets were such by virtue either of Common Law or of Statute. Those which were assets at Common Law were (*a*) choses in possession (i.e. ordinary chattels), (*b*) choses in action, and (*c*) chattel interests in land (i.e. leaseholds). Those which were assets by Statute were (*a*) estates *pur autre vie*, (*b*) estates in fee simple not devised for or charged by the owner's will with the payment of his debts, and (*c*) the statutory separate estate of a married woman.

Equitable assets were those formerly recognised only in a Court of Chancery. They were—

(*a*) Estates *pur autre vie* and in fee simple devised for or charged by the owner's will with the payment of his debts;
(*b*) Property over which by his will the deceased exercised a general power of appointment;
(*c*) The equitable separate estate of a married woman.

Before Hinde Palmer's Act, 1869, specialty creditors were entitled to be paid in full out of legal assets before simple contract creditors received anything. Since the Act, they rank *pari passu*, and the distinction remained only with regard to an executor's right of preference and retainer, which could only be exercised out of legal assets. That distinction has now apparently ceased to exist.

APPLICATION OF ASSETS OF SOLVENT ESTATE FOR PAYMENT OF DEBTS.

The following is the order in which the assets are to be applied towards the payment of funeral, testamentary and

administration expenses, and the debts and liabilities of the deceased. This order will, of course, yield to any contrary direction which may be contained in the will; and is further subject to the rules stated below with regard to charges on the property of the deceased (Part II of 1st Schedule, A.E.A.).

1. Property undisposed of by will subject to the retention thereout of a fund sufficient to meet any pecuniary legacies.
2. Property not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies so far as these have NOT been provided for out of (1).
3. Property specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts.
4. Property charged with or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts.
5. The fund, if any, retained as above, to meet pecuniary legacies.
6. Property specifically devised or bequeathed, rateably according to value.
7. Property appointed by will under a general power of appointment including the statutory power under S. 176, L.P.A., 1925, to dispose of entailed interests, rateably according to value.

These rules do not, however, affect the liability of land to answer the death duty imposed thereon in exoneration of other assets.

This order is necessary for the purpose of marshalling the assets as among beneficiaries.

CHARGES ON PROPERTY.

The Real Estate Charges Acts, 1854 and 1877 (commonly known as Locke King's Acts) have been repealed: but, by S. 35, A.E.A., where a person dies possessed of, or entitled to, or by his will (under a general power of appointment, including the statutory power to dispose of entailed interests) disposes of an interest in property, which at the time of his death is charged with the payment of money, the interest so charged shall be primarily liable for the payment of the charge.

The charge may be by way of legal mortgage, equitable charge or otherwise (including a lien for unpaid purchase money).

The will may indicate a contrary intention, and effect must be given thereto; but such a contrary intention is not signified by—

(i) a general direction for payment of debts out of the personal estate, or the residuary real and personal estate, or the residuary real estate;

(ii) a charge of debts upon any such estate, unless there are words which by express or necessary implication refer to all or some part of the charge.

The person entitled to the charge can, of course, resort to any of the assets of the deceased for payment or satisfaction.

STATUTE-BARRED DEBTS.

These may be paid by the personal representative, but not after they have been declared by the Court to be barred; but the personal representative may not pay a debt which is unenforceable under the Statute of Frauds or the Sale of Goods Act.

The inclusion of a statute-barred debt by the personal representative in an inventory exhibited in the Probate Division, or in an account filed in the Chancery Division in administration proceedings, or in the affidavit for Inland Revenue, is a sufficient acknowledgment to take the debt out of the operation of the Statutes of Limitations.

CHAPTER VII

DISTRIBUTION OF ESTATE AMONG BENEFICIARIES

THE personal representative's duty is to distribute among the beneficiaries the balance of the estate after payment of debts.

If there is a will, he will carry out its directions ; and if there is then a residue undisposed of (i.e. no residuary gift), there is a partial intestacy, when the rules applicable to distribution on intestacy apply. These rules are stated in the next chapter.

LEGACIES.

A legacy is a gift by will of personal estate ; it is also called a bequest.

A devise is a gift by will of real estate.

Legacies are—

(i) *Specific*, i.e. of something forming part of the testator's estate, specifically identified by a sufficient description. A sum of money may be specific, e.g. "the £100 owed me by X." All devises are specific.

(ii) *General*, i.e. not so specified—a gift of something which, if the testator leaves sufficient assets, must be raised out of his general estate.

(iii) *Pecuniary*—general legacies of money.

(iv) *Demonstrative*, i.e. a pecuniary legacy payable out of a particular fund. A demonstrative legacy—

(*a*) is not adeemed by total or partial failure at the testator's death of the fund out of which it is payable, but will then be payable *pari passu* with the ordinary general legacies ;

(*b*) does not abate with the general legacies until after the particular fund out of which it is payable is exhausted.

(For "ademption" and "abatement" see *infra*.)

(v) *Residuary*—a gift of the remainder of the estate after payment of debts and other legacies.

A legacy may fail by reason of—

(i) Uncertainty, either in the subject-matter of the gift or in the legatee.
(ii) Lapse.
(iii) Ademption.
(iv) Satisfaction.
(v) Attestation of the will by the legatee.
(vi) Non-fulfilment of a condition.

LAPSE.

A legacy to a person who predeceases the testator is void and is said to lapse, but this is subject to the following :—

(i) By S. 32, W.A., if a devise of an estate tail is made to a person who predeceases the testator, but leaves issue living at the testator's death who would have had an interest in such estate tail, the gift will not lapse, but will take effect as if the devisee had died immediately after the testator.
(ii) By S. 33, W.A., a gift to issue of the testator, who predecease him and leave issue living at his death, does not lapse, but takes effect as though the legatee or devisee had died immediately after the testator. This, however, does not apply to a gift to a class, but only to gifts to specific persons. A gift to " the children of my son John " is a gift to a class and the section will not apply. A gift to " my children John, Charles and James " is not a gift to a class, and on the death of one of them the section would apply.

There is no lapse of a legacy of a statute-barred debt to a creditor by reason of the creditor dying before the testator. In any case, where a legacy is given in discharge of an obligation of the testator to the legatee, there will be no lapse, whether the obligation is one which is legally binding or not.

ADEMPTION.

A legacy is said to be adeemed—

(i) in the case of a specific gift, where the subject-matter ceases to form part of the testator's estate before his death ;
(ii) by an advance by the testator during his lifetime to the legatee. The ademption may then be a total or partial ademption.

The object of this rule is to secure equality among children. It will not be applied where its only effect

would be to reduce children's shares for the benefit of strangers (*re* Heather, 1902, 2 Ch. 230);

(iii) when it is expressed to be given for a particular purpose, and the testator has, after the will, made a gift to the legatee for the same purpose.

SATISFACTION.

Like ademption, satisfaction arises from the presumption against double portions. Where a father is under an obligation to provide a portion for his child, a gift by his will to that child will be presumed, subject to a contrary intention appearing from the will, to be in satisfaction, wholly or in part, of that portion. The rule extends to shares of residue and to gifts by persons *in loco parentis*; and if a person has covenanted to leave money or a share of his estate to another, and fails to do so, and if that other takes a share by reason of an intestacy, there is *pro tanto* satisfaction of the obligation.

SATISFACTION OF DEBTS.

In the absence of a contrary intention shown by the will, a debt is deemed to be satisfied by a legacy of an equal or greater amount.

But this presumption is rebutted by a direction to pay debts and has no application where the debt was incurred by the testator after the date of the will.

If the debt is paid off, the legacy will be adeemed (*re* Rattenbury, 1906, 1 Ch. 667).

GIFTS TO ATTESTING WITNESSES.

Such gifts are void; and also gifts to the wife or husband of an attesting witness (W.A., S. 15).

A legatee, who merely attests a codicil and does not attest the will, does not lose a legacy given by the will, although the codicil confirms the will (Tempest *v.* Tempest, 2 K. J. 642).

If a will, attested by a witness, is republished by a codicil not attested by him, the legacy will be good (Anderson *v.* Anderson, 13 Eg. 381).

Where there are more than two witnesses and one is a legatee, the legacy will be good if it can be shown that the legatee did not sign as a witness, but if in fact they have all signed as witnesses the gift will not be good merely because there is a surplusage and two witnesses would have been sufficient.

CONDITIONAL GIFTS.

Conditions attached to gifts may be—

(i) Precedent, or
(ii) Subsequent.

A condition precedent means that the performance of the condition must precede the vesting of the interest.

A condition subsequent means that the non-performance of the condition will determine an interest which has been previously vested.

If a condition subsequent is inconsistent with or repugnant to an estate or interest to which it is attached, it is void, e.g. a condition imposing an absolute prohibition against marriage.

Conditions against public policy are void (Egerton *v.* Brownlow, 4 H.L.C. 1), and the gift is absolute.

DISCLAIMER.

A legatee may disclaim his devise or bequest, but is presumed to have assented unless he disclaims. Disclaimer may be by conduct. One of two gifts to him may be disclaimed without disclaiming the other, unless, in substance, they form one complete gift.

CHARITIES.

Where there is a gift to a charity which has ceased to exist, the legacy will be applied *cy près* (i.e. the Court will carry out the general purpose of the gift) provided there is a general charitable intention. A gift for a particular purpose without a general charitable intention will in such circumstances fail.

ELECTION.

Election is an equitable doctrine under which :—

(i) Where a testator by his will makes a gift to A, and also makes a gift to B of property which belongs to A, then unless A confirms the gift to B, he must make compensation to B out of the gift to himself.

If A is an infant, the Court will direct an inquiry as to which course is the more beneficial to him.

(ii) Where a testator has made a gift, which is presumed to be in satisfaction of an obligation to provide a portion, the beneficiary may, at his option, disclaim the legacy and elect to take the benefit of the obligation.

VESTED OR CONTINGENT LEGACIES.

A legacy may be vested at the death (i.e. the legatee has a present vested interest in it, though the time for payment may be postponed), e.g. a gift to a child to be paid on attaining twenty-one; or it may be contingent (i.e. only payable in a certain event), e.g. if and only if the child attains twenty-one.

INCOME AND INTEREST.

A specific bequest or devise, whether vested or contingent, carries the income arising from the subject of the bequest as from the testator's death; so does a contingent residuary devise or bequest, and also a gift to trustees in trust for persons whose interests are contingent (L.P.A., S. 175).

General legacies only carry interest from the expiration of one year from testator's death (Wood *v.* Penoyre, 13, Ves. 325).

A legacy payable at a future date carries interest from the time fixed for its payment.

RESTRAINT ON ANTICIPATION.

This may be annexed to a gift to a woman, but it operates only during coverture.

ESTATES TAIL.

The power given by S. 176, L.P.A., to dispose by will of an entailed interest is subject to the following provisions—

(i) It applies only to wills executed or confirmed or republished after 1925.

(ii) It is exercisable only by the tenant in tail in possession.

(iii) It extends to money to be invested in the purchase of property of which, if it had been so invested, he would have been tenant in tail in possession at his death.

ABATEMENT.

Where the fund for the payment of *general legacies* is insufficient, in the absence of a contrary direction, the general legacies abate (i.e. are reduced) *pari passu*. The fund so available is, of course, determined after payment of debts, funeral and testamentary expenses, and after the assets have been marshalled in the manner previously mentioned.

Annuities abate on their capital value.

When the assets not specifically bequeathed are insufficient for the payment of debts, the specific legatees will suffer abatement in proportion to the value of their respective legacies.

PAYMENT.

The executor cannot be compelled to pay any legatee within a year, even though the will expressly requires earlier payment. He may, if he chooses, pay within the year.

ANNUITIES.

These run from the death, but in the absence of a contrary direction the first instalment does not become due until the expiration of a year.

A sum of money directed to be invested in the purchase of an annuity carries no interest during the year. Where money is so bequeathed, and the legacy is vested for the life of the legatee, it is a vested legacy ; and the legatee may take either the sum or the annuity.

STATUTE OF LIMITATIONS.

Proceedings for recovery of a legacy are barred after twelve years from the time when a present right to receive the same accrued to a legatee capable of giving a discharge for or release of the legacy (Real Property Limitation Act, 1874, S. 8). The time runs from the death, part payment or acknowledgment, not from the expiration of a year after the death, provided it is an immediate not reversionary interest, and the legatee is *sui juris.*

ASSENT.

To render a bequest or devise (or an interest passing by devolution or appropriation) complete, the assent of the executor is necessary. This applies equally to a residuary bequest. Once given, the assent is irrevocable. It relates back to the testator's death, and the legatee is entitled to recover the intermediate profits of the thing bequeathed. The assent is equally necessary in the case of a gift to the executor (S. 36 (1) and (2), A.E.A.).

Unless the assent is in writing, is signed by the personal representative, and names the person in whose favour it is given, it is not effectual to pass a legal estate. Notice of the assent in such a case may be required by the person, in whose favour it is made, to be annexed to the probate or letters of administration at the cost of the estate (S. 36 (4) and (5), A.E.A.).

PURCHASERS FOR VALUE.

In favour of a purchaser for money or money's worth, a statement in writing by a personal representative that he has

not given or made an assent or conveyance in respect of a legal estate is sufficient evidence thereof, unless notice of a previous assent or conveyance affecting that estate has been placed on or annexed to the probate or administration.

This is not, however, to prejudice any previous disposition made in favour of another purchaser deriving title, mediately or immediately, under the personal representative.

Such a statement by a personal representative operates for the purpose of imposing liability on the personal representative as if it were a statutory declaration (S. 36 (6) and (7), A.E.A.).

A conveyance to a purchaser by a personal representative is not invalidated only by reason that the purchaser has notice that all the debts or liabilities, legacies, funeral, and testamentary expenses and duties, etc., have been provided for or discharged (S. 36 (8), A.E.A.).

By S. 37, A.E.A., all conveyances made to a purchaser by a personal representative are valid, notwithstanding any subsequent revocation or variation of the grant.

REFUND OF LEGACIES.

Although legacies have been paid, and although the year has elapsed from the death, a legatee is bound to refund in order to satisfy debts.

By S. 36 (9), A.E.A., although an assent has been given (except in favour of a purchaser), the right of the personal representative or other person is retained to recover the estate or interest to which it relates, or to be indemnified out of such estate or interest against any duties, debt or liability to which it would have been subject if there had been no assent or conveyance.

CONDITIONAL ASSENT.

A personal representative may, as a condition of giving an assent or making a conveyance, require security for the discharge of any duties, debt or liability. He is not, however, entitled to delay giving an assent merely by reason of the subsistence of any such duties, debt or liability, if reasonable arrangements have been made for discharging them.

FOLLOWING PROPERTY.

An assent does not prejudice the rights of any person to follow the property into the hands of the person in whom it is vested by the assent or conveyance, or into the hands of any other person (except a purchaser for value) who may have received it or in whom it may be vested (S. 38 (1), A.E.A.).

POWERS OF COURT.

Notwithstanding any assent or conveyance, the Court may, on the application of a creditor or other person interested—

(i) order a sale, exchange, mortgage, charge, lease, payment, transfer or other transaction to be carried out which the Court thinks requisite for giving effect to the rights of the parties interested ;

(ii) declare any person in whom the property is vested (other than a purchaser) a trustee for those purposes ;

(iii) give directions respecting the preparation and execution of any conveyance or other instrument or as to any other matter required for giving effect to the order ;

(iv) make any vesting order, or appoint a person to convey. (S. 38 (2), A.E.A.)

TAKING POSSESSION BEFORE ASSENT.

Before giving an assent, a personal representative may permit the person entitled to take possession of the land ; but without prejudice to the personal representative's right to take or resume possession, or to convey the land as if he himself were in possession.

INFANT'S SHARE OR LEGACY.

Where an infant is absolutely entitled under a will or on an intestacy, the personal representative cannot pay over his share to him ; but, unless the will appoints trustees, he may appoint a trust corporation or two or more persons (not exceeding four) to be the trustee or trustees of such legacy or share, and vest the devise, legacy, residue, or share in such trustees. On such appointment, the personal representatives are discharged from liability (S. 42, A.E.A.).

The personal representative may also pay the money into Court.

CHAPTER VIII

THE DISTRIBUTION OF THE RESIDUARY ESTATE ON INTESTACY

By S. 45, A.E.A., the old law as to the devolution of the beneficial interest in property on the death of an owner intestate after 1925 is radically altered.

All existing modes, rules and canons of descent are abolished. Special customs such as Borough English and Gavelkind cease to operate. Tenancy " by the curtesy," and every other estate and interest of a husband in real estate as to which his wife dies intestate, and, conversely, dower and freebench and any other interest of a wife in the real estate as to which her husband dies intestate, are abolished ; so also is escheat.

For many years after 1925, however, the old law will, in certain cases, have to be known ; and it is, so far as is material, set out in the Appendix I.

The descent or devolution of an entailed interest is not affected by the Act. By S. 46, A.E.A., the residuary estate of an intestate will, where the death occurs after 1925, be distributed in the manner shown in the following table, or held by the personal representative on the statutory trusts detailed below—

If the intestate leaves :—	*The distribution is as follows :—*
1. Husband or wife, *and no issue*, but some other of the relations mentioned below.	Husband or wife takes (1) personal chattels (see definition below) absolutely ; (2) £1,000 net, free of death duties and costs, with 5 per cent. interest thereon from death till payment or appropriation ; and (3) a life interest in the rest.
2. Husband or wife *and issue*.	Husband or wife takes personal chattels absolutely, and £1,000 as above, and a life interest in half the rest. Subject thereto, the property is held on the statutory trusts for the issue (see below). If these trusts fail in the lifetime of the husband or wife, he or she takes a life interest in the other half also. If there are no relations, she or he will take the whole estate (see 7 below).

If the intestate leaves :—	*The distribution is as follows :—*
3. No husband or wife, but issue.	The whole residue is held on the statutory trusts for the issue (see below).
4. No issue but both parents.	Parents take in equal shares absolutely, subject to rights of husband or wife (as above).
5. No issue, but one parent only.	Father or mother takes absolutely, subject to rights of husband or wife (as above).
6. No issue and no parents, but other relations.	Subject to the rights of a surviving husband or wife, property is held for those of the following who are living at the death, in the order stated— (1) On statutory trusts for brothers and sisters of the whole blood—then (2) On statutory trusts for brothers and sisters of the half blood—then (3) Grandparents in equal shares absolutely—then (4) On statutory trusts for uncles and aunts, being brothers and sisters of the whole blood of a parent of the intestate—then (5) On statutory trusts for uncles and aunts being brothers or sisters of the half blood of a parent of the intestate—then (6) For surviving husband or wife absolutely.
7. Husband or wife, but none of the relations mentioned above.	Husband or wife takes everything absolutely.
8. No husband or wife, and no relations, or only relations more distant than those above mentioned.	The Crown or the Duchy of Lancaster or Duke of Cornwall takes as *bona vacantia* in lieu of any right of escheat, but may, out of the whole or any part of the property, provide, in accordance with existing practice, for dependants, whether kindred or not of the intestate, and for other persons for whom he might reasonably have been expected to make provision.

HUSBAND AND WIFE.

For all the purposes of distribution or division under the foregoing, a husband and wife are treated as two persons.

"PERSONAL CHATTELS."

These are defined as "carriages, horses, stable furniture and effects (not used for business purposes), motor-cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors, and consumable stores."

They do *not* include chattels used at the death of the intestate for business purposes, nor money or securities for money (S. 55 (x), A.E.A.).

STATUTORY TRUSTS.

These are defined by S. 47, A.E.A. Where property is required by the above table to be held on statutory trusts, it is to be held upon the following trusts, that is to say—

(i) for all or any of the children of the intestate, living at the death, who attain twenty-one or marry under that age;

(ii) for all or any of the issue living at the death, who attain twenty-one or marry under that age, of any child of the intestate who predeceases him, such issue to take (through all degrees, according to their stocks, in equal shares, if more than one) the share which their parent would have taken if living at the death of the intestate. No issue will take whose parent is living at the death of the intestate and so capable of taking;

(iii) the statutory power of advancement and the statutory provisions relating to maintenance and accumulation of surplus income apply;

(iv) when an infant marries, such infant is entitled to give valid receipts for the income of the infant's share or interest;

(v) where the property is divisible into shares, any money or property which the intestate has paid to a child, or settled on him by way of advancement or on marriage, shall, in the absence of a contrary intention expressed or appearing from the circumstances of the case, be taken as paid or settled in or towards satisfaction of the share which the child would have taken if living at the

death of the intestate, and shall be brought into account at a valuation, the value being reckoned as at the death ;

(vi) the personal representative may permit an infant contingently interested to have the use and enjoyment of any personal chattels.

HOTCHPOT.

Sub-division (v) above is a statutory provision as to hotchpot.

A child, and only a child, must bring into hotchpot any sums advanced to him or her by the parent during the parent's lifetime.

Advancement is a payment of part of what a child would have been entitled to on the parent's death. It is a payment intended to establish the child in life, not an ordinary payment for maintenance or education. Such an advance must be brought into hotchpot before the child takes a share in the estate. This rule only applies on an intestacy and to moneys advanced by the parent. It operates only for the benefit of other children, not for the benefit of the widow or widower. The children of a deceased child must observe the rule when standing in the place of such child. Where the sum advanced exceeds the share to which the child advanced is entitled, such excess cannot be recovered.

See also the corresponding presumptions against double portions in the case of legacies under a will under the headings " Ademption " and " Satisfaction " (see p. 39).

WHERE ISSUE FAIL TO ATTAIN A VESTED INTEREST.

Where the trusts for the issue fail by reason of no child or other issue attaining a vested interest, then the estate and the income, and all statutory accumulations of income, if any, devolve, under the provisions of S. 46 above, as if the intestate had died without leaving issue living at the death (S. 47 (2), A.E.A.).

TRUSTS FOR RELATIVES OTHER THAN ISSUE.

Where the estate is to be held under S. 46, on statutory trusts for any class of relatives other than issue, it is to be held on trusts, corresponding to the statutory trusts for issue as if those trusts were repeated with the substitution of references to the members of that class for references to children of the intestate. *But* trust (v) above relating to the bringing of money or property into account has no application (S. 47 (3), A.E.A.).

HUSBAND'S OR WIFE'S LIFE INTEREST.

By S. 48, A.E.A., where a husband or wife is entitled to a life interest, the personal representative, with his or her consent (or if such tenant for life is the sole personal representative, then with the leave of the Court), may purchase or redeem the life interest while it is still in possession by paying its capital value (reckoned according to tables selected by the personal representative) to the husband or wife or the persons deriving title under him or her, and then the residuary estate may be dealt with or distributed free from such life interest.

RAISING MONEY.

The personal representative may raise on the security of the whole on any part of the personal estate (other than the personal chattels)—

(i) the sum of £1,000, or any part thereof, payable under S. 46 to husband or wife ;
(ii) the sum required, or any part thereof, to purchase or redeem the husband's or wife's life interest ;
(iii) the costs of such transactions. (S. 48 (2), A.E.A.)

PARTIAL INTESTACY.

By S. 49, A.E.A., where there is a partial intestacy only the above rules regarding distribution apply to that part, subject to the provisions of the will, and subject also to any issue bringing into hotchpot any beneficial interest received under the will (this applies to issue only).

The personal representative becomes a trustee for those entitled of the part of the estate not expressly disposed of, unless it appears from the will that the executor is entitled to take it.

NOTE.—Before 1926, no account was taken in cases of partial intestacy of benefits received under the will, and an executor was sometimes entitled to take undisposed of personalty.

LUNATICS AND DEFECTIVES.

If on 1st January, 1926, a lunatic or defective of full age is unable, by reason of his incapacity, to make a will, and thereafter dies (i) without recovering his testamentary capacity and (ii) entitled to a beneficial interest in real estate (not including chattels real, and not being an interest ceasing on his death), such interest shall devolve in accordance with the law in force before 1926 (S. 51 (2), A.E.A.).

INFANTS.

S. 51 (3), A.E.A., provides that where an infant dies, without having been married, equitably entitled under a settlement or will to a vested estate in fee simple, or an absolute interest in freehold land or in any property settled to devolve therewith, or as freehold land, the settlement shall be construed as if it gave the infant an entailed interest only.

An entailed interest cannot be disposed of by an infant by will, and the effect of this sub-section is to determine the infant's interest. Apparently, it cuts down the effect of the Wills (Soldiers and Sailors) Act, 1918, and an infant soldier or sailor who dies unmarried will be unable to dispose of real property by his will.

MAINTENANCE.

By S. 31, T.A., the income of any property held in trust for any person, for any interest whether vested or contingent, may be applied to that person's maintenance. This extends not merely to infants but to others who, on attaining twenty-one, do not get a vested interest in the income, but the provision is subject to the income not having been otherwise disposed of by the will.

The trustees or personal representative may apply the whole or such part of the income as may in all the circumstances be reasonable, and must regard all the circumstances, particularly other sources of income available for the infant's maintenance, education or benefit.

ACCUMULATIONS OF INCOME.

By S. 31 (2), T.A., where an infant's interest is vested he is absolutely entitled to the accumulations at twenty-one, or marrying under that age. Where he has only a contingent life interest, or a vested life interest, but he dies unmarried under twenty-one, the accumulations become an accretion to capital.

ADVANCEMENT.

After 1925, in the absence of a contrary intention, a power of advancement will be implied where the property consists of—

(i) money or securities ;
(ii) property held on trust for sale.

It is not implied if the property is, by statute or by equity, considered as land, or is applicable as capital money under the Settled Land Act, 1925.

The power exists where a person is entitled to property, whether absolutely or contingently, or subject to a gift over on his death, and whether in possession or not. Only one-half of his vested or presumptive share may be advanced, and when he becomes absolutely entitled to his share, he must account for the money advanced.

No advancement may be made to the prejudice of any person entitled to a prior interest, unless he is in existence and of full age and gives a written consent.

This power of advancement out of capital is not confined to infants (S. 32, T.A.).

APPENDIX I

DEVOLUTION ON INTESTACY WHERE THE DEATH OCCURRED *BEFORE* 1926

In the case of deaths occurring before 1926, it is still necessary to ascertain the heir to real property according to the rules of Common Law as modified by the Inheritance Act, 1833, and the next of kin entitled to the deceased's personality according to the provision of the Statutes of Distribution, 1670 and 1685.

Before stating these rules, the position of the husband or wife of an intestate dying before 1926 must be shown.

The Husband is then entitled to all his wife's personalty, and if he has had by her issue born alive, who might have inherited her heritable real estate, he takes a life interest therein. The husband's life estate is called "an estate by the curtesy of England."

The Wife—If the husband leaves issue living at his death, the wife takes one-third of his personalty and a life interest in one-third of his heritable realty (the interest in realty being called "the widow's right to dower"). This right exists whether the husband's interest was legal or equitable (Secs. 2 and 3, Dower Act, 1833).

Where the husband dies childless and intestate, the widow, by the Intestates' Estates Act, 1890, is entitled to a first charge of £500 upon his estate which is chargeable rateably upon both the realty and personalty. The value of the estate for the purposes of this charge is to be ascertained at the death, not at the date when it falls into possession. The widow retains her right to dower out of the residue of realty, and is entitled to one-half instead of one-third of the residue of personalty.

Subject to the above, the rules of intestate succession to a person dying before 1926 are as follows :—

(A) REALTY.

1. Descent is traced from the last purchaser, i.e. the person who acquired the land otherwise than by descent, escheat, enclosure or partition.

   By Secs. 19 and 20 of the Law of Property Amendment Act, 1859, where there is a failure of heirs of the last purchaser, descent may be traced from the person last entitled to the land. This provision has had the effect of preventing escheat in certain cases.

2. The issue of the purchaser take first.
3. Males take before females. The eldest male takes before the younger, while all female relatives of the same degree take equally (as coparceners).
4. Issue stand in the place of their ancestor, so that if a person who would, if living, have been heir, is dead, his descendants or one of them stand in his place for the purpose of inheriting.
5. When the issue is exhausted, the nearest male paternal ancestor, i.e. the father of the intestate, takes.
6. Where the common ancestor is a male, relatives of the half blood take after relatives of the whole blood. Where the common ancestor is a female, they take next after that ancestor.
7. The mother of the more remote male paternal ancestor and her heirs take before the mother of the nearer male paternal ancestor.
8. The mother of the purchaser and her heirs take only after a total failure of paternal relations.

(B) PERSONALTY.

1. The descendants of the intestate take, *per stirpes*, that is by families, all children taking equally, and if any are dead their children or remoter issue stand in their place and take their share. There is no preference of male over female.
2. If the issue are exhausted the father takes.
3. If he is dead, the mother, brothers and sisters take in equal shares. If one or more of these are alive, the children (but not remoter issue) of any deceased brother or sister take his or her share.
4. If the mother and all the brothers and sisters are dead, the nearest relations take *per capita*.

   For the purpose of calculating degrees of relationship, it is necessary to count up to the common ancestor and then down to the relation concerned, e.g. nephews and nieces are thus in the third degree ; brothers and sisters in the second degree.
5. There is no distinction between relations of the whole blood and those of the half blood.

MARSHALLING OF ASSETS.

The following is the order in which assets must be marshalled for the payment of debts as between beneficiaries in the case of a death occurring before 1926 :—

1. The general personal estate not bequeathed at all, or bequeathed only by a residuary gift.
2. Real estate devised for the payment of debts.

3. Real estate which descended to the heir.
4. Real estate devised specifically or by a residuary gift, and charged with the payment of debts.
5. General pecuniary legacies (including annuities).
6. Specific legacies and real estate devised either specifically or by a residuary gift, and not charged with the payment of debts.
7. Property appointed by will under a general power of appointment.

APPENDIX II

AUTHORISED SECURITIES. TRUSTEE ACT, 1925

(See p. 25)

1.—(1) A trustee may invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say :—

(*a*) In any of the parliamentary stocks or public funds or Government securities of the United Kingdom ;

(*b*) On real or heritable securities in the United Kingdom, including the security of a charge on freehold land by way of legal mortgage and a charge under section thirty-three of the Finance Act, 1896 ;

(*c*) In the stock of the Bank of England or the Bank of Ireland :

(*d*) In India seven, five-and-half, four-and-half, three-and-half, three and two-and-half per cent. stock, or in any other capital stock which may at any time be issued by the Secretary of State in Council of India, under the authority of any Act of Parliament, and charged on the revenues of India, or any other securities the interest in sterling whereon is payable out of and charged on the revenues of India ;

(*e*) In any securities the interest of which is for the time being guaranteed by Parliament ;

(*f*) In consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or in debenture stock created by the Receiver for the Metropolitan Police District, or in Metropolitan Water Stock ;

(*g*) In the debenture or rentcharge, or guaranteed or preference stock of any railway company in the United Kingdom incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum on its ordinary stock ;

(*h*) In the stock of any railway or canal company in the United Kingdom whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in paragraph (*g*) of this subsection, either alone or jointly with any other railway company ;

(*i*) In the debenture stock of any company owning or operating a railway in India the interest in sterling on which is paid or guaranteed by the Secretary of State in Council of India ;

(*j*) In the " B " annuities of the Eastern Bengal, the East Indian, the Scinde Punjaub and Delhi, Great Indian Peninsular and Madras Railways, or in any securities substituted therefor, and any like annuities which may at any time after the commencement of this Act be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway ; also, in deferred annuities comprised in the register of holders of annuity Class D and annuities comprised in the register of annuitants Class C of the East Indian Railway Company ;

(*k*) In the stock of any company owning or operating a railway in India, upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed ;

(*l*) In the debenture or guaranteed or preference stock of any company in the United Kingdom established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five per centum on its ordinary stock ;

(*m*) In nominal or inscribed stock issued, or to be issued, under the authority of any Act of Parliament or Provisional Order, by the corporation of any municipal borough in the United Kingdom having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, or by any county council in the United Kingdom ;

(*n*) In nominal or inscribed stock issued or to be issued by any commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having according to the returns of the last census prior to the date of investment a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners have not exceeded eighty per centum of the amount authorised by law to be levied ;

(*o*) In any stocks, funds or securities authorised under the Colonial Stock Act, 1900, or any Act extending the same, but subject to any restrictions thereby imposed ;

(*p*) In any local bonds issued under the Housing (Additiona Powers) Act, 1919, and mortgages of any fund or rate granted after the passing of that Act under the authority of any Act or Provisional Order by a local authority (including a county council) which is authorised to issue local bonds under that Act ;

(*q*) In any stock or securities issued in respect of any loan raised by the Government of Northern Ireland ;

(*r*) In any of the stocks, funds, or securities for the time being, authorised for the investment of cash under the control or subject to the order of the Court ;

and may also from time to time vary any such investment.

2. For the purposes of this section—

(*a*) The London and North Eastern Railway Company, the Southern Railway Company, the London Midland and Scottish Railway Company, and the Great Western Railway Company shall each be treated as if it were a railway company in Great Britain incorporated by a special Act of Parliament which had in each of the ten years immediately before the date of amalgamation paid a dividend at a rate of not less than three per centum on its ordinary stock, and, for the purposes of this provision the date of amalgamation means—

(i) As respects the London and North Eastern Railway Company and the Southern Railway Company, the first day of January, nineteen hundred and twenty-three ; and

(ii) As respects the London Midland and Scottish Railway Company and the Great Western Railway Company, the first day of July, nineteen hundred and twenty-three ;

(*b*) A railway or canal company in Northern Ireland whose system is situate partly in Northern Ireland and partly in the Irish Free State shall not be deemed to be a railway or canal company in Northern Ireland.

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